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Review of Public Policy for Chemicals: National and International Issues, by Sam Gusman et al.

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BOOK REVIEWS

PUBLIC POLICY FOR CHEMICALS: NATIONAL AND INTERNATIONAL ISSUES. By Sam Gusman, Konrad von Moltke, Frances Irwin & Cynthia Whitehead. Washington: The Conversation Foundation, 1980. Pp. xiv, 144. \$8.50.

The Conservation Foundation's **PUBLIC POLICY FOR CHEMICALS**, a cooperative effort of four authors and several other contributors and advisers, is intended as "a primer on notification, testing, and control of chemicals. It is an overview rather than a detailed treatise." (P. xi)

Within these limits, the authors attempt to deal with a number of broad and complicated issues arising in the relatively new field of toxic chemical regulation, including hazard assessment and testing, notification requirements as a prerequisite for a substance's entry into commerce, and regulation of established hazards. In addition, the book includes sections on international trade and transfer and dissemination of information about chemical hazards.

A comparison of two legislative enactments—the United States' Toxic Substances Control Act ("TSCA")¹ and a recent directive on dangerous substances issued by the Council of Ministers of the European Communities ("the EEC directive")²—frames much of the discussion in this work. TSCA, which has been in effect since 1977, is one of the more recent of several congressional attempts to deal with environmental problems in the United States, and one of the most ambitious. The EEC directive creates a binding obligation on member states to implement its scheme for controlling toxic chemicals as domestic law before September, 1981.

Extended comparison of these two enactments tends to obscure

1. 15 U.S.C. §§ 2601-2629 (1976 & Supp. III 1979).

2. 22 O.J. Eur. Comm. (No. L 259) 11 (1979). The European Communities include the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC), which was established by the Treaty of Rome, under the authority of which this directive was promulgated. The Council of Ministers is an institution common to all three communities. Experience suggests that member states will rarely ignore its directives. B. COCKS, *THE EUROPEAN PARLIAMENT* 3-5, 8-9, 30 (1973).

differences in the magnitudes of the undertakings they express. TSCA is potentially an extremely powerful piece of legislation. In particular, it includes provisions for review of currently marketed chemicals and for regulation by categories of chemicals. This latter possibility is especially important, for it allows in principle for a more rapid implementation of regulations than would be possible if the toxic character of each substance within a category had to be established individually. By contrast, the EEC directive contains no provisions for review of currently marketed chemicals or regulation by category. Instead, it focuses on notification to a government agency before a new chemical is marketed, an approach analogous to TSCA's requirement for premanufacture notification. Because the authors are primarily interested in stressing broad international recognition of the need for regulation of chemicals, they fail to emphasize sufficiently the substantial differences between the two regulatory undertakings.

The authors are unduly sanguine about the current state of toxic chemical regulation in the United States and Europe. For example, they do no more than hint at the fact that, more than four years after its enactment, TSCA has yet to be satisfactorily implemented. Despite the Act's great potential, the General Accounting Office in a recent report found that because implementation of TSCA by the Environmental Protection Agency ("EPA") has been ineffective³ and slow "neither the public nor the environment are [*sic*] much better protected."⁴ The authors, who are content with simply describing the legislation as it exists on paper rather than pointing to the Act's ineffective implementation, fail to propose any suggestions for more aggressive regulatory action.

The book's analysis of TSCA is also flawed because of its failure to consider TSCA in the context of the several other federal environmental statutes enacted as a result of increased environmental awareness in the past decade. More particularly, TSCA is not the only regulatory mechanism for controlling public exposure to toxic chemicals in the environment. The authors, however, give only cursory attention to other federal environmental legislation which

3. The United States Court of Appeals for the District of Columbia, for example, recently struck down EPA's rule for controlling polychlorinated biphenyls because it was not strict enough. *Env'tl Defense Fund, Inc. v. EPA*, No. 79-1580, slip op. at 40-41 (D.C. Cir. Oct. 30, 1980).

4. U.S. GENERAL ACCOUNTING OFFICE, EPA IS SLOW TO CARRY OUT ITS RESPONSIBILITY TO CONTROL HARMFUL CHEMICALS i (1980).

provides regulatory authority for controlling hazardous substances, such as the Clean Air Act,⁵ the Federal Water Pollution Control Act,⁶ and the Occupational Safety and Health Act.⁷ Surprisingly, the book fails entirely to mention the Resource Conservation and Recovery Act,⁸ under which the disposal of hazardous waste is regulated. Examination of previous EEC action on toxic substances is similarly superficial.

PUBLIC POLICY FOR CHEMICALS addresses many more issues than the framework of a comparison of the EEC directive with TSCA can comfortably accommodate. This may be the book's greatest failing—a perfunctory treatment of a great number of topics. Certainly the concept of a primer on toxic chemical control for “interested members of the public, businessmen, government officials, and legislators” (P. xi) is a worthy venture. Many of the problems in this field, however, are complicated and the subject of considerable controversy. The treatment of many issues may be so concise as to be impenetrable to a reader previously unfamiliar with the area of toxic substance regulation. Moreover, the authors do little to suggest areas of disagreement among concerned groups, such as industry, government, and environmentalists. Indeed, in a work of this length, it would be difficult to satisfy the needs of even one of the groups for whom it is intended.

For example, the question of the requisite certainty of harm that will support a regulation is currently of substantial concern in the United States.⁹ This is an issue that affects both the legal and scientific communities in the context of judicial review of regulations. **PUBLIC POLICY FOR CHEMICALS**, however, addresses this matter in slightly more than a page. The abbreviated discussion of this point does little to suggest its central importance for contemporary environmental regulatory schemes or to give a balanced presentation of the controversy.

Although much of their discussion is insubstantial, the authors succeed admirably in identifying many of the important issues in

5. 42 U.S.C. §§ 7401-7642 (Supp. I 1977 & Supp. II 1978).

6. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

7. 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

8. 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979).

9. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (invalidating Occupational Safety and Health Administration's benzene rule for lack of substantial supporting evidence that lowering benzene exposure would be beneficial in reducing number of cancers).

the area of hazardous substance control, such as adequacy of testing and sufficiency of cost-benefit analyses. Scientific issues, however, generally receive better treatment at the hands of the authors than do legal niceties. Epidemiological, animal, and bacteriological tests are discussed in terms comprehensible to the layman without great loss of nuance. By contrast, important administrative law issues, such as legal tests applied by American courts in reviewing the adequacy of regulations and the differences between formal and informal rulemaking, merit little more than passing attention. Indeed, the institution of judicial review in both America and Europe, so important in this field, is described in scarcely more than half a page.

The most valuable contribution of *PUBLIC POLICY FOR CHEMICALS* is probably its international perspective. A serious commitment to environmental regulation necessarily entails dealing with international issues on a number of levels. The authors examine the question of harmonization of different nations' policies to achieve common goals. Recognition of foreign test data to avoid duplication and to conserve domestic regulatory resources, for example, is identified as a high priority.

Still, the proposition that nations in general and the United States in particular will continue to take advantage of foreign markets for domestically controlled substances goes largely unquestioned.¹⁰ Although there may be difficult policy questions inherent in regulating exports in the same manner as imports and products for domestic consumption, a nation with a commitment to environmental quality and safety certainly has some obligation to protect foreigners' health and environment from substances it has itself determined to be hazardous.

PUBLIC POLICY FOR CHEMICALS provides a satisfactory summary of TSCA and the 1979 EEC directive, but unfortunately fails to provide references to statutory provisions and contains no index. More importantly, it successfully identifies many of the scientific, legal, and policy problems to be solved in dealing with this com-

10. EPA has recently recognized and responded to this problem with its limited statutory authority in this area. TSCA, § 12(a)(1)(A), 15 U.S.C. § 2611(a)(1)(A) (1976), as a general rule exempts exports from regulation under the Act's other provisions. EPA's rule elaborates the requirements of TSCA, § 12(b), 15 U.S.C. § 2611(b) (1976), which requires notification of foreign governments concerning certain data on exported chemicals which are regulated under TSCA. 45 Fed. Reg. 82,844 (1980) (to be codified at 40 C.F.R. §§ 707.60-.75).

plex issue. Without more detailed discussion, however, the significance of these issues may escape a reader previously unfamiliar with the intricacies of chemical regulation. Then, too, a more sophisticated reader would probably demand a more detailed discussion with greater attention to nuance and subtlety. The businessmen, government officials, and legislators for whom the work is intended would probably benefit from a more refined analysis as an aid to informed decisions. Whether or not the concise approach of *PUBLIC POLICY FOR CHEMICALS* is warranted, it is far from the last word on toxic substance regulation.

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